

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the	)	NOTICE OF AMENDMENT
amendment of ARM 24.29.4301,	)	
24.29.4303, 24.29.4314,	)	
24.29.4321, 24.29.4332, and	)	
24.29.4335, all related to	)	
the workers' compensation	)	
reporting database	)	

TO: All Concerned Persons

1. On August 25, 2005, the Department of Labor and Industry published MAR Notice No. 24-29-198 regarding the public hearing on the proposed amendment of the above-stated rules relating to the workers' compensation reporting database at page 1570 of the 2005 Montana Administrative Register, Issue no. 16.

2. On September 14, 2005, the Department of Labor and Industry held a public hearing in Helena regarding the above-stated rules at which oral comments were received. Additional written comments were received prior to the closing date of September 23, 2005.

3. The Department has thoroughly considered the comments and testimony received. The following is a summary of the comments received and the Department's responses to those comments:

Comment 1: A comment requested an explanation of the purpose of the reporting requirements for claimants' attorneys.

Response 1: As provided by 39-71-225, MCA, the purpose of the workers' compensation reporting database system is to provide management information to the legislative and executive branches. To that end, the department has adopted the International Association of Industrial Accident Boards and Commissions (IAIABC) reporting standards. These standards detail reporting requirements for insurers. However, the standards do not detail reporting requirements for attorneys. The department needs to gather data in order to compare the amount of legal fees paid by insurers versus the amount of legal fees paid by claimants on workers' compensation claims, as part of the collection of the costs of legal involvement as required by 39-71-225(2)(a)(iii), MCA. Hence, the department initially promulgated ARM 24.29.4332 in 1995 regarding claimants' attorney reporting. Over time, the department discovered that the reports from claimants' attorneys do not allow for meaningful comparison because the reports do not cover the same time period as reports from insurers. In addition, more reporting was required than was useful. The rule amendments adopted in this notice are intended to make claimant attorney

and insurer reporting more uniform and at the same time reduce reporting requirements, in order to provide more useful data.

To that end, as indicated below, the department has changed the claimant attorney reporting rule to require an initial report upon the first payment of legal fees rather than upon the first payment of costs by a claimant. Therefore, the first report is not required until the first payment of a fee. Because the majority of fee payments occur upon settlement, only one report in total is required from claimants' attorneys in that situation. The department estimates about 75% of reporting on attorney fees paid by claimants will occur on a one-time basis.

Further, certain legal fee payments confuse the straightforward purpose of comparing fees paid by claimants to fees paid by insurers. For example, in the case of liens, although an insurer makes the payment of the fee, the actual fee comes out of the claimant's benefits and must therefore be categorized as paid by the claimant. Under Montana's application of IAABC standards, insurers report these payments as claimants' benefit payments. Therefore, the department requires claimants' attorneys to report these fees, the same as all other fees and costs paid by or on behalf of a claimant, in order to come up with proper comparison data.

Comment 2: Numerous comments were received from claimants' attorneys stating the proposed amendment to ARM 24.29.4332(2) was unreasonably burdensome because it required the initial legal fee report within 14 days of receipt of the first payment of legal costs for each claim. Under such a requirement, the attorneys commented they would be required to file reports on every claim right at the beginning since the first cost charged to claimants is the cost of getting a copy of the file from the insurer.

Response 2: The department agrees that such a requirement is unduly burdensome and accordingly has amended ARM 24.29.4332(2). As amended, the initial legal fee report will be required when the attorney actually receives the first fee payment from the claimant on or behalf of the claimant. Therefore, no reporting of costs is required when the attorney receives the first cost payment, but costs are then reported when fees are reported.

Comment 3: Numerous comments were received from claimants' attorneys and from the Montana Trial Lawyers Association stating the proposed amendments to ARM 24.29.4332 would cause an undue burden upon them because they believed the rule would increase the number of reports that are required. They also commented such an undue burden would in turn be an increased burden on claimants because the existing regulation of workers' compensation claims already reduces the number of attorneys willing to represent such claimants.

Response 3: In light of the amendment discussed in Response 2, the department believes the proposed rule decreases the reporting requirements because the first report due, the initial report, is only submitted when the attorney actually receives a payment of fees. As mentioned, many times the first and only payment of fees is at

settlement. The proposed rule therefore requires only one report in cases where the first and only fee payment received is at settlement. As a result, the department does not believe the new reporting requirements will cause an undue burden on claimants' attorneys. In the cases where the attorney receives biweekly payments of legal fees, then the initial legal report is due within 14 days of the first fee payment and a subsequent legal fee report is due within 14 days of each six-month anniversary of the injury or occupational disease until no further fees are expected.

Comment 4: Numerous comments were received from claimants' attorneys questioning why six-month intervals were important because the attorneys believed the calendaring process for six-month intervals would be burdensome. A comment was also received that it was burdensome to have the reports due within 14 days of the triggering event because attorney billing is usually done on a 30-day basis.

Response 4: As discussed in the "General Statement of Reasonable Necessity" in the proposal notice, the department determined its business processes and rule related to attorney reporting of fees and costs should be consistent with insurer reporting in order to get more meaningful results from the data reported. Insurers are required to report their legal fees and cost payments at six-month intervals on the subsequent reports they submit to the department as required by ARM 24.29.4321(3), so this notice amends the rule to place claimant attorney reporting on a six-month interval as well.

The department does not believe the six-month interval will require burdensome calendaring for the small percentage of claims that are not dealt with in one report upon settlement because the department sends a reminder to attorneys just prior to the six-month anniversary for each subsequent report that is due. Therefore, claimants' attorneys do not need to calendar reports.

Regarding the 14-day window, the previous version of ARM 24.29.4332(4) required claimants' attorneys to submit the reports within 10 days of the triggering event. The 14 days is consistent with insurer's reporting requirements and is longer than the previous rule. The department intends to use the due date to trigger reminder notices and follow-up with attorneys who may have missed submission of reports. No other consequences are planned. Therefore, the department concludes the 14-day time frame is not unduly burdensome.

Comment 5: Numerous comments were received from claimants' attorneys stating the complexity of apportioning legal fees and costs to separate claims when the attorney represents the claimant on multiple claims.

Response 5: The department agrees this could result in unnecessary problems and has amended ARM 24.29.4332(2) accordingly.

Comment 6: A couple of comments were received that questioned why ARM 24.29.4332(1)(b) specifically referenced the Lockhart case and stated it was not clear or necessary.

Response 6: The department agrees with the comment and agrees it is not necessary to specifically refer to the Lockhart case. The department has amended ARM 24.29.4332(1)(b) accordingly. The department also amended ARM 24.29.4332(6)(a) to clarify that the report must include the, “total amount of legal fees paid to date by the claimant or on behalf of a claimant.”

Comment 7: A couple of comments stated the rules weren’t clear as to who reports the claimant legal fees and costs paid by the insurer. The commenter stated the payment reports might be duplicated if the rule isn’t clear.

Response 7: The department agrees that the rules need to be clarified to indicate that the insurer reports the insurer's legal fees and costs paid by the insurer, while the claimants' attorneys report the legal fees and costs paid by or on behalf of the claimant. Regarding claimant's legal fees and costs that are paid by the insurer to claimants' attorneys as part of a settlement, under IAIABC standards, insurers currently report these payments as claimants' benefits payments rather than payments of legal fees and costs. Therefore, the department requires claimants' attorneys to report their fees and costs payments in order to accurately show what is paid as legal fees and costs. The department is then able to use IAIABC reporting codes for insurers to properly compare the data. The department has amended ARM 24.29.4335(1) to clarify that insurers report on a per-claim basis, the amount of the insurer’s legal fees and costs. Insurer reporting of benefits remains as it has always been reported under ARM 24.29.4321.

Comment 8: A comment was received that recommended replacing the term “trading partner” with “reporting agent”, amending all references of “legal fees” to “attorney fees”, and deleting references to “consultant fees”. The commenter noted that 39-71-225, MCA, and associated statutes use the phrase attorney fees rather than legal fees. The commenter also suggested amending the insurer reporting requirements by itemizing the legal cost items in order to make the insurer rule read the same as the claimant attorney rule.

Response 8: The department participates in the IAIABC’s efforts to nationally standardize the reporting requirements so the department chooses to use the IAIABC terms and definitions wherever possible. The terms “trading partner” and “legal fees” are defined in the IAIABC Data Dictionary so the department will not change these terms.

ARM 24.29.4339 was not noticed or part of the hearing process for these rules changes, and therefore, the department cannot address the rule's use of the phrase "consultant fees" in this notice of amendment. The department will take into consideration the comment recommending deletion of “consultant fees” at the next update to these rules.

The department does not believe the insurer rule needs to read the same as the attorney rule at this time because insurer reporting is much more extensive and is

detailed by the IAIABC reporting requirements. ARM 24.29.4321 addresses general insurer reporting and does not contain specifics due the IAIABC standards. ARM 24.29.4335 regarding insurer reporting of legal fees is simply intended to clarify that this reporting is required in addition to the reporting in ARM 24.29.4321. However, the insurer reporting under ARM 24.29.4335 is also under IAIABC standards.

Comment 9: The Montana Self-Insurers Association commented that the complete set of rules should be included in the proposed rules notice so that readers could better understand the meaning and consequences of the proposed changes.

Response 9: While the department agrees including the complete rules in a rules notice aids readers in understanding the proposed changes, such an approach would substantially increase the cost of rules notices due to the per page charges for publication by the Secretary of State and for additional copying and mailing expense. The department prefers to hold down costs and will provide complete copies of rules to any interested party that makes a specific request so that the party can read the notice within its complete context. The department also makes its current rules accessible on the internet for this and other purposes.

Comment 10: Two comments pointed out that by including the phrase "but are not limited to" to preface the list of costs required to be reported by claimants' attorneys, ARM 24.29.4332 could cause disagreements about reporting requirements for costs.

Response 10: The department acknowledges the potential for disagreement but believes the potential is small. In the past, claimants' attorneys have reported costs and the department has not had any problems with the reports. The list is included in the rule as a guideline to reporting all costs.

Comment 11: One comment asked whether claimants' attorneys will have to report the information in a specific electronic format.

Response 11: Currently, the department will accept reports from claimants' attorneys via email, fax, or mail. The department does not require electronic reporting at this time.

Comment 12: One comment wondered whether any report would have to be filed if there is nothing new to report in six months.

Response 12: If it is not a first and final report due to one payment at settlement, reports have to be filed every six months even if no information has changed. In this circumstance, the department suggests refiling the last report by simply copying it and updating the date.

Comment 13: One comment thought that claimants' attorneys should not have to report on six-month intervals because under ARM 24.29.4335, insurers only report on a per claim basis.

Response 13: Insurers are also required to report in six-month intervals. The "per-claim" language in ARM 24.29.4335 is required every six months by virtue of the reference to ARM 24.29.4321.

Comment 14: Keith Messmer, Chief of the Workers' Compensation Regulations Bureau, commented that the Uninsured Employers Fund (UEF) should be excluded from the "subsequent report" reporting requirement in ARM 24.29.4321(3). He stated the UEF does not have a benefit payment database that can provide the information in an electronic format and that the expense of reporting the data manually would outweigh the benefit since UEF has only a small number of claims per year. He explained that the UEF also might not make payments at the same times and in the same amounts as insurers since payments are dependent on funding. He also pointed out that 39-71-225, MCA, does not require the UEF to report data because the UEF does not meet the definition of an insurer or of any of the other required reporting parties. Finally, he noted that the UEF provides year-end statistical data to the department for inclusion in the department's Workers' Compensation Annual Report.

Response 14: The department agrees that the UEF should not submit subsequent reports because the UEF is not required to by statute and because the potential data submitted by the UEF is not necessarily comparable or useful for database purposes. The department has amended ARM 24.29.4321(3), as indicated below, to exclude UEF from the requirement of submitting subsequent reports.

4. After consideration of the comments, the department has amended ARM 24.29.4301, 24.29.4303, and 24.29.4314 exactly as proposed.

5. After consideration of the comments, the department has amended ARM 24.29.4321, 24.29.4332, and 24.29.4335 as proposed, but with the following changes, stricken matter interlined, new matter underlined:

24.29.4321 INSURER REPORTING REQUIREMENTS--INJURIES AND OCCUPATIONAL DISEASES (1) All insurers and the UEF are required to submit a first report of injury ~~and or~~ occupational disease to the department within 30 days of the report to the insurer of the accident or of an occupational disease.

(2) remains as proposed.

(3) All insurers ~~and the UEF~~ are required to submit to the department a workers' compensation subsequent report for every indemnity claim within 14 days of the occurrence of any one of the following triggering events:

(a) through (6) remain as proposed.

AUTH: 39-71-203, MCA

IMP: 39-71-225, 39-71-307, MCA

24.29.4332 CLAIMANT LEGAL FEES AND COSTS REPORTING REQUIREMENTS (1) All attorneys that represent claimants shall report, on a per-claim basis, the amount of legal fees and costs received for each claim where:

(a) the attorney has an approved fee agreement; and  
(b) the attorney actually receives a fee from the claimant or on behalf of a claimant. ~~For purposes of this rule, a fee received on behalf of a claimant as a result of a Lockhart lien is a fee withheld by the insurer from a payment to the medical provider and issued to the attorney pursuant to Lockhart v. New Hampshire Ins. Co., 1999 MT 205, 295 Mont. 465, 984 P.2d 744.~~

(2) An initial legal fee report must be reported to the department within 14 days of the date the attorney actually receives the first fee or cost payment for each claim. If an attorney represents a claimant on multiple claims, the fees and costs for all claims need only be reported on one of the claims.

(3) through (5) remain as proposed.

(6) A claimant attorney must report to the department, in the form prescribed by the department, the following information:

(a) the total amount of ~~attorney~~ legal fees paid to date by the claimant or on behalf of a claimant; and

(b) through (b)(vi) remain as proposed.

AUTH: 39-71-203, MCA

IMP: 39-71-225, MCA

#### 24.29.4335 INSURER LEGAL FEES REPORTING REQUIREMENTS

(1) All insurers shall report, on a per-claim basis, the amount of the insurer's legal fees and costs, claimant's legal fees, and including fees paid to expert witnesses, that have been paid to date by the insurer, associated with each indemnity claim. That information must be reported on the subsequent report required by ARM 24.29.4321.

(2) remains as proposed.

AUTH: 39-71-203, MCA

IMP: 39-71-225, MCA

/s/ MARK CADWALLADER

Mark Cadwallader,  
Alternative Rule Reviewer

/s/ KEITH KELLY

Keith Kelly, Commissioner  
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State February 13th, 2006